Bank Pertanian Malaysia Bhd v Koperasi Permodalan Melayu Negeri Johor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-4–02 OF 2014(J)
RAUS SHARIF PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH, RAMLY ALI, AZAHAR MOHAMED FCJJ
30 SEPTEMBER 2015

Civil Procedure — Appeal — Appeal against judgment of High Court — High Court allowed claim by respondent for declaration that third party memorandum of deposit given by respondent to bank was invalid and unenforceable — Whether money deposited under memorandum of deposit together with profit ought to be returned — Whether there was breach of contract by bank in infringing terms of memorandum of deposit by premature liquidation or uplifting of fixed deposit of RM13m together with profit accrued

Sometime in 2000 – 2001, there were two pieces of undeveloped land known owned by Yayasan Kelantan Darulnaim ('YAKIN') but were leased to a private company known as Terokai Pertiwi Sdn Bhd ('TPSB') for a term of 66 years. They were both classified as agricultural land for the purpose of oil palm plantations. The respondent ('the Koperasi') had taken over the whole equity of TPSB for a sum of RM12.5m. Subsequently, the lands in question were effectively leased by the Koperasi through a wholly-owned subsidiary, TPSB. In order to develop the lands as oil palm plantations, the Koperasi engaged another private company known as Estate and Forestry Consulting Management Sdn Bhd ('EFCM'). EFCM carried on, inter alia, the business of consultation, development and plantation of oil palm. The Koperasi and EFCM entered into an agreement known as the oil palm plantation and development agreement ('the agreement') whereby the Koperasi appointed EFCM to develop oil palm plantation on the said lands, based on the representation made by EFCM that it had the requisite technology, expertise, experience and financial resources to undertake the development and planting of oil palm. After the execution of the agreement, the appellant ('the bank') granted a term loan facility of RM25m to EFCM. The facility agreement between the bank and EFCM clearly made reference to the said project development in the agreement. The project development proceeded after the execution of all the relevant documentations were executed. The Koperasi issued various certificates of practical completion to the bank for the purpose of disbursement of the loan. Accordingly, the bank had progressively disbursed loan to EFCM as developer of the project development. As at 1 June 2003, the Koperasi however had only deposited and pledged the sum of RM13m with the bank under the MOD leaving a shortfall of RM12m. The Koperasi failed

to deposit the shortfall despite reminders by the bank. In the meantime, EFCM defaulted in repayment of the loan. The bank commenced legal proceedings against EFCM for recovery of the loan. The bank obtained judgment in default against EFCM and uplifted the deposit pledged by the Koperasi under the MOD, and utilised it to reduce the debt due and owing under the loan. The Koperasi disputed the validity of the MOD issued in favour of the bank. The Koperasi claimed that the MOD was an invalid instrument and demanded that the amount deposited under the MOD be returned to it. The Koperasi commenced the present claim in the High Court against the bank for, inter alia, a declaration that the MOD in question was ultra vires and void ab initio and sought the return of the fixed deposits uplifted by the bank. The bank counterclaimed for the sum of RM12m, being the shortfall due from the Koperasi pursuant to the MOD. The judicial commissioner ('JC') allowed the Koperasi's claim and dismissed the bank's counterclaim. The issues brought forth at the High Court was the validity of the MOD for which the Koperasi has prayed for a declaration to the effect that it was invalid and for the return of the money deposited under the MOD together with profit accrued thereon; and breach of contract by the bank in infringing the terms of the MOD by premature liquidation or uplifting of the fixed deposit of RM13m together with profit accrued. The JC held that the MOD was ultra vires the provisions of the 1993 Act and invalid on the ground that the 1993 Act contained no power to authorise the Koperasi to issue guarantee by way of an MOD in favour of the bank. On the second issue, the JC held that the bank had breached the terms of the MOD by uplifting the fixed deposits pledged, before it exhausted all legal action against EFCM and other security providers. The Court of Appeal agreed with and affirmed the decision of the High Court and dismissed the bank's appeal with costs. Hence, the present appeal.

Held, allowing the appeals:

(1) The principle of law as adopted by the Supreme Court in *Malaysia Shipyard* and *Chase Manhattan* could be adopted and followed. However, the relevant 'by-laws' of the Koperasi must also be considered. Paragraphs 4 and 5 of the Koperasi's by-laws are relevant and applicable to determine the issue under s 53 of the 1993 Act. Generally, by-laws of a co-operative society, made by the society itself, are merely rules of conduct governing its internal management. The object or purpose of incorporation of a registered co-operative society is an important element to be considered in determining whether a 'transaction' under s 53 of the 1993 Act is ultra vires the scope of the said section. The object or propose of the Koperasi could be found in s 4 of the 1993 Act as well as paras 4 and 5 of its by-laws (see paras 53–54 & 77).

(2) Paragraph 4 of the by-laws and s 4(1) of the 1993 Act clearly provide that the object and purposes of the Koperasi is for the promotion of the economic interest of its members in accordance with co-operative principles. A co-operative society once duly registered under the 1993 Act shall become a body corporate with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suit and other legal proceedings and to do all things necessary for the purposes for which it is constituted (see paras 55 & 57).

(3) The evidence adduced showed that the Koperasi was not a mere independent third party who gave guarantee. The Koperasi was not a total stranger or an independent third party that had no relation at all to the loan granted to EFCM. The Koperasi, clearly had an interest in the loan granted to EFCM because without the loan from the bank, the agreement could not be affected and the oil palm project could not be carried out (see paras 58 & 62).

(4) The Court of Appeal affirmed the decision of the High Court and dismissed the bank's appeal. The reasoning of the Court of Appeal, in essence, was the same as that of the High Court, save for one material difference ie that in arriving at its decision the Court of Appeal applied the 1993 Act as amended by the 2007 Amendment which only came into effect on 1 January 2008, about six to seven years after the relevant transactions had taken place. The Court of Appeal had erred in applying the 2007 Amendment in determining the validity of the MOD. The Court of Appeal should not have relied on provisions of laws which were not in existence or not in force at the time when the relevant transactions took place in 2001–2002 (see paras 83 & 85).

(5) The 1993 Act vide the 2007 amendment had no retrospective effect and therefore should not be considered at all in dealing with the present case. The 2007 amendment should not affect the previous operation of the 1993 Act or anything duly done or suffered thereunder. Such amendment also should not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed or amended law. This was clearly provided for under s 30(1) of the Interpretation Acts 1948 and 1967 (Act 388). The 2007 amendment is thus not applicable to the instant case (see para 91).

(6) Breach by the bank in prematurely uplifting the entire fixed deposit in violation of the proviso to cl 4 of the MOD did not render the MOD void ab initio. In the circumstances of the case, all that the Koperasi was entitled to was to be put in a position as if the breach had not occurred. If the breach had in any way resulted loss to the Koperasi, damages would

have to be assessed, so far as money could do so, to compensate the Koperasi by placing it in the same position as if the breach had not occurred (see para 100).

[Bahasa Malaysia summary

Pada tahun 2001 – 2001, terdapat dua bidang tanah yang tidak dibangunkan diketahui dimiliki oleh Yayasan Kelantan Darulnaim ('YAKIN') tetapi dipajak kepada syarikat swasta dikenali sebagai Terokai Pertiwi Sdn Bhd ('TPSB') untuk tempoh 66 tahun. Kedua-dua diklasifikasikan sebagai tanah pertanian bagi tujuan perladangan kelapa sawit. Responden ('Koperasi') telah mengambil alih keseluruhan ekuiti TPSB untuk jumlah sebanyak RM12.5 juta. Berikutan itu, tanah yang dipersoalkan telah secara efektif dipajak oleh Koperasi melalui pemilikan penuh subsidiari, TPSB. Dalam usaha untuk memajukan tanah sebagai ladang kelapa sawit, Koperasi menggunakan satu lagi syarikat swasta dikenali sebagai Estate and Forestry Consulting Management Sdn Bhd ('EFCM'). EFCM menjalankan, antara lain, perniagaan perundingan, kemajuan dan perladangan kelapa sawit. Koperasi dan EFCM memasuki satu perjanjian dikenali sebagai perjanjian perladangan dan kemajuan kelapa sawit ('perjanjian') yang mana Koperasi melantik EFCM untuk memajukan ladang kelapa sawit di atas tanah tersebut, berdasarkan representasi yang dibuat oleh EFCM bahawa ia mempunyai teknologi yang diperlukan, kepakaran, pengalaman dan sumber kewangan untuk melaksanakan kemajuan dan penanaman kelapa sawit. Selepas pelaksanaan perjanjian, perayu ('bank') memberikan pinjaman kemudahan bertempoh sebanyak RM25 juta kepada EFCM. Perjanjian kemudahan antara bank dan EFCM secara jelas merujuk kepada pembangunan projek di dalam perjanjian. Projek pembangunan diteruskan selepas pelaksanaan kesemua dokumentasi yang berkaitan dilaksanakan. Koperasi mengeluarkan pelbagai sijil praktikal penyempurnaan kepada bank bagi tujuan pengeluaran pinjaman. Sewajarnya, bank telah mengeluarkan pinjaman secara progresif kepada EFCM sebagai pemaju projek pembangunan. Pada 1 Jun 2003, Koperasi walau bagaimanapun hanya telah mendepositkan dan menjanjikan jumlah sebanyak RM13 juta dengan bank di bawah MOD meninggalkan kekurangan sebanyak RM12 juta. Koperasi gagal untuk mendepositkan kekurangan meskipun peringatan daripada pihak bank. Sementara itu, EFCM mungkir dalam pembayaran pinjaman. Bank itu memulakan prosiding undang-undang terhadap EFCM bagi mendapatkan pinjaman. Bank memperoleh penghakiman ingkar terhadap EFCM dan menarik semula deposit jaminan oleh koperasi di bawah MOD, dan menggunakan untuk mengurangkan hutang yang kena dibayar dan terhutang di bawah pinjaman. Koperasi mempertikaikan kesahihan MOD dikeluarkan memihak kepada bank. Koperasi mendakwa MOD adalah satu instrumen yang tidak sah dan menuntut bahawa jumlah yang didepositkan di bawah MOD dikembalikan kepadanya. Koperasi memulakan tuntutan ini di Mahkamah Tinggi terhadap bank untuk, antara lain, satu deklarasi bahawa MOD berkenaan adalah ultra

vires dan tidak sah *ab initio* dan meminta pulangan daripada deposit tetap yang dikeluarkan oleh bank. Bank itu membuat tuntutan balas bagi jumlah sebanyak RM12 juta, yang kekurangan dibayar oleh koperasi selaras dengan MOD. Pesuruhjaya kehakiman ('PK') membenarkan tuntutan Koperasi dan menolak tuntutan balas bank. Isu-isu yang dibangkitkan di Mahkamah Tinggi adalah kesahihan MOD yang mana Koperasi telah berdoa memohon satu deklarasi yang bermaksud bahawa ia tidak sah dan bagi pemulangan wang yang disimpan di bawah MOD bersama-sama dengan keuntungan terakru ke atasnya; dan pelanggaran kontrak oleh bank dalam melanggar syarat-syarat MOD melalui pembubaran pramatang atau kenaikan deposit tetap bagi RM13 juta bersama-sama dengan keuntungan terakru. PK memutuskan bahawa MOD adalah bercanggah dengan peruntukan Akta 1993 dan tidak sah atas alasan bahawa 1993 tidak mengandungi kuasa untuk memberi kuasa kepada Koperasi untuk mengeluarkan jaminan melalui suatu MOD memihak kepada bank. Mengenai isu kedua, PK memutuskan bahawa bank telah melanggar syarat-syarat MOD oleh menaikkan deposit tetap yang dicagarkan, sebelum ia menggunakan kesemua tindakan undang-undang terhadap EFCM dan pembekal keselamatan yang lain. Mahkamah Rayuan bersetuju dan mengesahkan keputusan Mahkamah Tinggi dan menolak rayuan bank itu dengan kos. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Prinsip undang-undang yang diguna pakai oleh Mahkamah Agung di *Malaysia Shipyard* dan *Chase Manhattan* boleh diguna pakai dan diikuti. Walau bagaimanapun, 'by-laws' yang berkaitan untuk koperasi juga perlu dipertimbangkan. Perenggan 4 dan 5 undang-undang kecil koperasi itu adalah berkaitan dan berkuat kuasa untuk menentukan isu itu di bawah s 53 Akta 1993. Secara umumnya, undang-undang kecil sesuatu syarikat kerjasama koperasi, yang dibuat oleh syarikat kerjasama itu sendiri, adalah semata-mata peraturan tindakan yang mengawal pengurusan dalaman. Objektif atau tujuan penubuhan suatu koperasi berdaftar adalah elemen penting yang perlu dipertimbangkan dalam menentukan sama ada 'transaksi' di bawah s 53 Akta 1993 adalah ultra vires skop seksyen tersebut. Objek atau tujuan koperasi boleh didapati dalam s 4 Akta 1993 dan juga perenggan 4 dan 5 undang-undang kecil (lihat perenggan 53–54 & 77).

(2) Perenggan 4 dalam undang-undang kecil dan s 4(1) Akta 1993 jelas memperuntukkan bahawa objek dan tujuan Koperasi adalah untuk mempromosikan kepentingan ekonomi anggotanya mengikut prinsip koperasi. Satu syarikat kerjasama koperasi sebaik sahaja berdaftar dengan sewajarnya di bawah Akta 1993 akan menjadi suatu pertubuhan perbadanan yang kekal turun-temurun dan mempunyai suatu meterai sama, dan dengan kuasa untuk memegang harta alih dan harta tak alih, untuk memasuki kontrak, untuk memulakan dan membela guaman dan

lain-lain prosiding undang-undang dan untuk melakukan segala perkara yang perlu bagi tujuan ia ditubuhkan (lihat perenggan 55 & 57).

(3) Keterangan yang dikemukakan menunjukkan bahawa Koperasi bukan hanya sekadar satu pihak ketiga yang bebas memberikan jaminan. Koperasi bukanlah sesuatu yang asing atau pihak ketiga yang bebas yang tidak mempunyai hubungan sama sekali untuk pinjaman yang diberi kepada EFCM. Koperasi, jelas mempunyai kepentingan dalam pinjaman yang diberikan kepada EFCM kerana tanpa pinjaman daripada bank, perjanjian tersebut tidak boleh terjejas dan projek kelapa sawit tidak dapat dijalankan (lihat perenggan 58 & 62).

(4) Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dan menolak rayuan bank. Sebab yang diberi di Mahkamah Rayuan, pada dasarnya, adalah sama dengan Mahkamah Tinggi, kecuali satu perbezaan ketara iaitu bahawa dengan membuat keputusan Mahkamah Rayuan mengguna pakai Akta 1993 sebagaimana telah diubah dengan pindaan 2007 yang hanya mula berkuat kuasa pada 1 Januari 2008, kira-kira enam hingga tujuh tahun selepas transaksi berkenaan telah berlaku. Mahkamah Rayuan terkhilaf dalam mengguna pakai pindaan 2007 dalam menentukan kesahihan MOD. Mahkamah Rayuan tidak sepatutnya bergantung kepada peruntukan undang-undang yang tidak wujud atau tidak berkuat kuasa pada masa urus niaga berkaitan berlaku pada tahun 2001–2002 (lihat perenggan 83 & 85).

(5) Akta 1993 melalui pindaan 2007 tidak mempunyai kesan retrospektif dan oleh itu tidak boleh dipertimbangkan sama sekali dalam menangani kes ini. Pindaan 2007 tidak boleh menyentuh penguatkuasaan terdahulu Akta 1993 atau apa-apa jua yang dilakukan atau dialami di bawahnya dengan sewajarnya. Pindaan itu juga tidak menjejaskan apa-apa hak, keistimewaan, obligasi atau liabiliti yang diperoleh, terakru atau ditanggung di bawah undang-undang yang dimansuhkan atau dipinda. Ini jelas diperuntukkan di bawah s 30(1) Akta Tafsiran 1948 dan 1967 (Akta 388). Pindaan 2007 itu tidak berkaitan dengan kes ini (lihat perenggan 91).

(6) Pelanggaran oleh bank dengan secara pramatang meningkatkan simpanan tetap melanggar proviso kepada klausa 4 daripada MOD tidak menyebabkan MOD tidak sah *ab initio*. Dalam hal keadaan kes itu, apa yang berhak dilakukan oleh Koperasi adalah dimasukkan ke dalam kedudukan seolah-olah pelanggaran itu tidak berlaku. Jika pelanggaran wujud dalam apa-apa cara kerugian kepada koperasi menyebabkan, ganti rugi perlu dinilai, setakat mana wang boleh berbuat demikian, untuk membayar pampasan kepada Koperasi dengan meletakkan ia dalam kedudukan yang sama seolah-olah pelanggaran itu tidak berlaku (lihat perenggan 100).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 902–915.

Cases referred to

Badan Pengurusan Bersama Paradesa Rustika v Sri Damansara Sdn Bhd [2014] 1 MLJ 14, FC (refd)
C & P Haulage (a firm) v Middleton [1983] 3 All ER 94, CA (refd)
Chase Manhattan Bank NA v Mercantile Co-Operative Thrift and Loan Society Ltd [1992] 2 MLJ 168, SC (folld)
Hadley v Baxendale (1854) 9 Ex 341 (refd)
Keith Sellar v Lee Kwang Tennakoon v Lee Kwang [1980] 2 MLJ 191, FC (refd)
Koufos v C Czarnikow Ltd [1969] 1 AC 350, HL (refd)
Lembaga Jurutera Malaysia v Leong Pui Kun [2009] 2 MLJ 36, FC (refd)
Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd [1985] 2 MLJ 359, SC (folld)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)
Robinson v Harman [1843 - 60] All ER Rep 383 (refd)
Small v Smith [1884-85] 10 AC 119, HL (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)

Legislation referred to

Bank Pertanian Malaysia Act 1969
Bank Pertanian Malaysia Berhad Act 2008 s 4(1)
Companies Act 1965
Contracts Act 1950 s 79
Co-operative Societies Act 1948 (repealed by the Co-operative Societies Act 1993) ss 2, 30, 31, 32
Co-operative Societies Act 1993 ss 2, 4, 4(1), 8, 9, 51, 51(1), 52, 53
Interpretation Acts 1948 and 1967 ss 18, 19(1), 30(1)
Malaysia Co-operative Societies Commission Act 2007

Appeal from: Civil Appeal No J-02–1605–07 of 2012 (Court of Appeal, Putrajaya)

Lambert Rasa-Ratnam (Mong Chung Seng and Chia Oh Shang with him) (Lee Hishammuddin Allen & Gledhill) for the appellant.
Ng Chew Hor (Kuna Nadesen with him) (Baharudin Wan & Kuna) for the respondent.

Ramly Ali FCJ (delivering judgment of the court):

[1] The respondent in the present appeal, Koperasi Permodalan Melayu Negeri Johor was the plaintiff while the appellant, Bank Pertanian Malaysia Bhd was the defendant in the suit at the High Court. For ease of reference, the respondent herein shall be referred to as the 'the Koperasi' and the appellant as 'the bank'.

[2] The Koperasi, at all material times is a body corporate or co-operative society registered under the Co-operative Societies Act 1993 ('the 1993 Act') (which as provided for under cl 4 of its by-laws) has as its object the promotion of economic interest of its members in accordance with co-operative principles. It was first registered on 3 March 1966 (under the earlier 1948 Act which was replaced by the 1993 Act). Its main objective involves the development of land in various sectors including agricultural and commercial development.

[3] The bank, is a body corporate duly incorporated pursuant to the Bank Pertanian Malaysia Act 1969 (which was wholly repealed and substituted by the Bank Pertanian Malaysia Berhad Act 2008 ('the 2008 Act'). By virtue of s 4(1) of the 2008 Act, all properties, rights and liabilities of the former Bank Pertanian Malaysia were transferred to and vested in the bank.

[4] The present appeal before us is against the decision of the High Court (which was later affirmed by the Court of Appeal) which allowed claim by the Koperasi for, inter alia, a declaration that a third party memorandum of deposit dated 22 March 2002 for the sum of RM25m ('the MOD') given by the Koperasi in favour of the bank is invalid and unenforceable.

FACTUAL BACKGROUND

[5] Sometimes in 2000–2001, there were two pieces of undeveloped land known as Lot PT4888, Mukim Ulu Nenggiri, Daerah Bertam; and Lot 3647, Mukim Relai, Daerah Chiku both in Gua Musang, Kelantan. The combined size of both lands were 10,291.40 acres. Both lands were owned by Yayasan Kelantan Darulnaim ('YAKIN') but were leased to a private company known as Terokai Pertiwi Sdn Bhd ('TPSB') for a term of 66 years. They were both classified as agricultural land for the purpose of oil palm plantations.

[6] In line with its main objective to develop land in various sectors including agricultural and commercial development, the Koperasi had on 26 February 2001 taken over the whole equity of TPSB for a sum of RM12.5m. Since that date TPSB became a wholly-owned subsidiary of the Koperasi. In other words, the lands in question were effectively leased by the Koperasi through a wholly-owned subsidiary, TPSB.

[7] In order to develop the lands as oil palm plantations, the Koperasi engaged another private company known as Estate and Forestry Consulting Management Sdn Bhd ('EFCM'). EFCM was incorporated as a private limited company under the Companies Act 1965 on 14 July 1995, which at the material time was carrying on, inter alia, the business of consultation, development and plantation of oil palm.

[8] On 12 November 2001, the Koperasi and EFCM entered into an agreement known as the oil palm plantation and development agreement ('plantation and development agreement') whereby the Koperasi appointed EFCM to develop oil palm plantation on the said lands, based on the representation made by EFCM that it had the requisite technology, expertise, experience and financial resources to undertake the development and planting of oil palm.

[9] Some of the salient terms of the plantation and development agreement which may be relevant to the present appeal before us are as follows:

(a) EFCM agreed to undertake the implementation of the project to develop the said lands into an oil palm plantation in accordance with the layout plan (recitals 6–7);

(b) the Koperasi agreed to accept the benefits from EFCM, and upon completion of the project, the Koperasi will pay EFCM the sum of RM40m (section 2.01(1));

(c) the effectiveness of the plantation and development agreement and the rights and obligations of the parties thereto are first subject to the fulfillment and satisfaction of the condition precedents, inter alia, that EFCM shall secure financing for the said project development (article IV(4));

(d) the Koperasi shall deliver to and deposit with the financier (for the project development) a sum of not more than RM25m by way of security deposit (section 2.01(2));

(e) the Koperasi will provide a letter of guarantee from a bank in respect of the balance of payment due to EFCM amounting to RM15m upon completion of the project development (section 2.01(3)); and

(f) the Koperasi may consent to the security deposit be treated as collateral to account of the disbursement made by the financier to EFCM, provided that any utilisation of the security deposit shall only upon certification by the Koperasi of work completed and only to the extent of the value of the work completed (section 5.01(4)).

[10] After the execution of the plantation and development agreement between the Koperasi and EFCM, the bank vide a letter of offer dated 6 December 2001 and a facility agreement dated 22 March 2002 granted a term loan facility of RM25m to EFCM (as the borrower) for the purpose of financing the said project development.

[11] Paragraph 2 of the letter of offer dated 6 December 2001 issued by the bank states:

> TUJUAN
>
> Pinjaman Berjangka adalah untuk membiyai sebahagian daripada kos kontrak membangunkan dua keping tanah seluas 10,291.49 ekar dengan tanaman kelapa sawit secara 'turnkey basis' di Gua Musang, Kelantan

[12] The facility agreement (between the bank and EFCM dated 22 March 2002) clearly made reference to the said project development in the plantation and development agreement dated 12 November 2001. The same recital also made reference to the request for the loan made by EFCM and the bank's letter of offer dated 6 December 2001 which clearly indicates that the purpose of the loan facility was for the development 10,291.49 acres of land into oil palm plantation on 'turnkey basis' in Gua Musang, Kelantan.

[13] Clause 1.3 of the facility agreement provides for securities for the loan, to be provided to the satisfaction of the bank:

(a) duly executed facility agreement between the bank and EFCM;

(b) the third party memorandum of deposit dated 22 March 2002 ('the MOD') granted by the Koperasi in favour of the bank by way of a fixed deposit under *Al-Mudharabah* principle;

(c) a third party first legal charge over the land held under HS(D) No 428 PTD No 4509 in the Mukim of Ulu Nenggiri, in the District of Gua Musang, in the State of Kelantan in approximate area of 607.3 hectares by Alan-Asra Agroturas Sdn Bhd;

(d) a third party first legal charge over the land at Aring 4 & 5, Relai, Chiku, Gua Musang, Kelantan in approximate area of 607 hectares (upon issuance of individual document of title) in favour of the bank;

(e) a deed of assignment issued by EFCM on proceeds of payments on the project development it received from the Koperasi;

(f) a deed of debenture issued by EFCM over its present and future fixed and floating assets; and

(g) a joint and several letter of guarantee and indemnity by the directors of EFCM namely: (i) Hassan Fikri bin Mohamed; and (ii) Mohd Rasulludin Deaver, in favour of the bank.

[14] The facility agreement was duly executed on 22 March 2002 by EFCM and the bank.

[15] The Koperasi, in fulfilling the abovementioned security requirement executed the MOD dated 22 March 2002 in favour of the bank. Paragraph 1.1 of the MOD, states that the Koperasi 'hereby deposit with the bank the investment account certificate ... made out in the bank's favour for a total sum of ringgit malaysia twenty five million (RM25m only) which shall be held by the bank as a continuing security pledge or lien for the due payment to the bank by the borrower (EFCM) on demand of all monies due to the bank during the facility period'. It is also stated in the same paragraph that the deposit of the MOD was made in consideration of the bank 'at our consent, granting or continuing to grant a facility up to a maximum aggregate principal amount of ringgit malaysia twenty five million (RM25m) only to ESTATE & FORESTRY CONSULTING MANAGEMENT SDN BHD ... upon the terms and subject to the conditions stipulated in the facility agreement ...'

[16] One pertinent point to the issue in the Koperasi's claims in the present case is found in para 4 of the MOD, which reads:

> KPMNJ (the Koperasi) hereby agrees that in the event the Borrower (EFCM) fails to repay the Facility due and owing to the Bank together with interest or other cost incurred during the facility period and Provided Always that the Bank has exhausted all available legal actions or proceedings against the Borrower and other security party(s) to recover amount due and owing by the Borrower to the Bank, the Bank are at liberty to withdraw the said Deposit or such other sum(s) as may be from time to time substituted for or replacing the said Deposit and to apply the proceeds thereof in or towards the discharged to any amount due to the Bank.

[17] The project development proceeded after the execution of all the relevant documentations were executed. As between 28 March 2002 to 10 May 2004, the Koperasi (using its own letter head, signed by its Director/Planting Advisor Hj Dzulkefli bin Hj Nasir and Pengurus Besar Hj Ariff Kassim) issued various certificates of practical completion to the bank for the purpose of disbursement of the loan. Accordingly, the bank had progressively disbursed loan to EFCM as developer of the project development. As at 1 June 2003, the Koperasi however had only deposited and pledged the sum of RM13m with the bank under the MOD leaving a shortfall of RM12m. Thereafter, the Koperasi failed to deposit the shortfall despite reminders by the bank.

[18] In the meantime, EFCM defaulted in repayment of the loan. On 5 March 2007 the bank commenced legal proceedings against EFCM for recovery of the loan. On 22 June 2007, the bank obtained judgment in default against EFCM.

[19] On 6 December 2007, the bank uplifted the deposit pledged by the Koperasi under the MOD, and utilised it to reduce the debt due and owing under the loan.

[20] On 31 December 2007, the Koperasi, through its solicitors, for the first time, disputed the validity of the MOD dated 22 March 2007 issued in favour of the bank. The Koperasi claimed that the MOD was 'an invalid instrument' and demanded that the amount deposited under the MOD (together with interest accrued) be returned to it within seven days from the date of the letter.

[21] On 2 April 2008, the Koperasi commenced the present claim in the High Court against the bank for, inter alia, a declaration that the MOD in question was ultra vires and void ab initio, and sought the return of the fixed deposits uplifted by the bank. The bank counterclaimed for the sum of RM12m, being the shortfall due from the Koperasi pursuant to the MOD.

[22] At the date when the Koperasi commenced the present claim in the High Court, the bank had disbursed the sum of RM23,935,000 to EFCM under the facility agreement for the purpose of the project development in question. This is based on the evidence adduced by the bank. Even based on the progressive certificates issued by the Koperasi, the value of work done in the project (as certified by the Koperasi) was RM20,188,336.65. On the evidence adduced during trial, EFCM had abandoned the work. There was no evidence to show that the Koperasi had paid EFCM the sum due to EFCM under the plantation and development agreement or any part of it.

[23] The project development had been substantially completed at the time the action was filed in the High Court. This is evidenced by the various reports namely the 'Laporan Progress Kerja dan Penyata Perbelanjaan Kontrak Turnkey' as well as in the certification in the 'Confirmation and Certification of Sums Expended To Date Being Part Development Expenditure Under Turnkey Project For the Development of Oil Palm Plantation of Teroka Pertiwi Sdn Bhd (A wholly subsidiary of KPMNJ) in Gua Musang' issued by the Koperasi from time to time during the project period (see Tabs 12, 13, 14 & 18 of the Common Core Bundle 3).

AT THE HIGH COURT

[24] After full trial, the learned judicial commissioner allowed the Koperasi's claim and dismissed the bank's counterclaim. In dealing with the matter before him, the learned judicial commissioner identified two issues to be determined, namely:

(a) the validity of the MOD for which the Koperasi has prayed for a declaration to the effect that it was invalid and for the return of the money deposited under the MOD together with profit accrued thereon; and

(b) breach of contract by the bank in infringing the terms of the MOD by pre-mature liquidation or uplifting of the fixed deposit of RM13m together with profit accrued thereon.

[25] On the first issue (the validity of the MOD), the learned judicial commissioner held that the MOD was ultra vires the provisions of the 1993 Act and invalid on the ground that the 1993 Act contains no power to authorise the Koperasi to issue guarantee by way of an MOD in favour of the bank. In coming to that finding the learned judicial commissioner relied strongly on the decisions of the Supreme Court in *Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd* [1985] 2 MLJ 359; and *Chase Manhattan Bank NA v Mercantile Co-Operative Thrift and Loan Society Ltd* [1992] 2 MLJ 168.

[26] In his grounds of judgment (at para 27) the learned judicial commissioner held:

> [27] In construing sections 51, 52 and 53 of the COS Act 1993 strictly in accordance with the words used, I upheld P's Contention that based on the principles enunciated in the Supreme Court Cases of Malaysia Shipyard and Chase Manhattan, there could be no other conclusion except that this Act contains no powers to authorise P to issue the guarantee to D by way of the MOD. Whether P challenged the validity of the guarantee after the loan was fully disbursed was irrelevant as the legality of the instrument was in question. The defence contention that from a literal reading of the above sections there was no prohibition against the giving of security to a non-member was clearly untenable as the law as it stands is that there must be an express provision authorising the cooperative to do so in order for giving of the said security to be valid in law. The power to bind the society to a contract of guarantee as in the present case must be properly sanctioned by statute for the contract to be enforceable.

[27] Further (at para 30 of the grounds of judgment) the learned judicial commissioner continued:

> [30] The object provision which was considered to take precedence was the basis of these decisions in holding that the guarantee in the first case and the pledge/set-off in the second case were invalid for being ultra vires the COS Act 1948. The guarantee issued by P in the instant case to a non-member for the benefit of another non-member was certainly against the object provision of the COS Act 1993. Far from promoting the economic interests of its members its effect was to jeopardise their economic interests by imposing a heavy lability on the society. I therefore held that the MOD issued by P was null and void for being in contravention with s 4 of the COS Act 1993. It was void ab initio and of no effect. In view of this decision, D's counter-claim for RM12.000.000.00 being the balance of the security sum which P should have deposited into the FD under the terms of the MOD together with interest from date of default had no basis whatsoever and had to be rejected.

[28] On the second issue, the learned judicial commissioner, held that the bank had breached the terms of the MOD by uplifting the fixed deposits pledged, before it exhausted all legal action against EFCM and other security providers.

[29] Abiding by the decision of the High Court, the bank returned the fixed deposits uplifted together with interest on them (which in total came to the sum of RM18,035,057.35) to the Koperasi on 30 November 2012.

AT THE COURT OF APPEAL

[30] The Court of Appeal agreed with and affirmed the decision of the High Court and dismissed the bank's appeal with costs of RM50,000. In coming to its decision, the Court of Appeal 'respectfully adopt the trite principle laid down by the Supreme Court in the case of *Malaysia Shipyard* that a statutory corporation can only do what is expressly authorised by the act under which it is incorporated'.

[31] The Court of Appeal agreed with and accepted the submission of learned counsel for the Koperasi that the issue of the validity of the MOD must be determined by reference to the provisions in the 1993 Act and not by reference to the Koperasi's by-laws since by-laws are rules of conduct which govern the internal government of the Koperasi.

[32] The Court of Appeal rejected submissions by learned counsel for the bank that the Koperasi was allowed by its by-laws (in particular by-law 5(g)) to grant the MOD in favour of the bank. In doing so, the Court of Appeal stated:

A [39] The by-laws of any statutory corporation can only provide for matters that are permissible under the Act and any by-laws which purports to allow what is prohibited by the Act, or are inconsistent with the provisions of the Act will, to that extent, be invalid for being ultra vires the Act. This is clearly provided by s 17A(1) of the Act which states as follows:

B Application of by-laws

17A (1) Any by-laws of a co-operative society which are inconsistent with the provisions of this Act shall be void to the extent of its inconsistency. Accordingly, no co-operative society can, by way of its by-laws, confer upon itself any power
C to enter into any transaction that has been expressly prohibited by the principal Act. Any by-laws which purports to allow a co-operative society to do what is expressly prohibited by the Act would be invalid for being ultra vires the Act. Therefore we are unable to agree with learned counsel for the Appellant that by-law 5(g) allows the Respondent to do what is prohibited by s 51(1). Further a perusal of by-law 5(g) shows that it is general in nature. It is also subject to the
D Act and the regulations. Hence by-law 5(g) must necessarily be read to apply only to those transactions that are permissible under the Act.

[33] On this issue, the Court of Appeal concluded that 'the MOD is invalid
E and unenforceable as it was issued in contravention of s 51(1) of the act'.

[34] What is interesting to observe here is that, from the judgment of the Court of Appeal, we find that the reasoning of the Court of Appeal, in essence, is the same as that of the High Court, save for one material difference ie in
F arriving at its decision, the Court of Appeal apparently applied the 1993 Act as amended by the Co-Operative Societies (Amendment) Act 2007 ('Act A1297') which only came into force on 1 January 2008 ('the 2007 amendment'); while the relevant transaction, particularly the granting of the MOD in favour of the bank by the Koperasi took place on 22 March 2002.
G

[35] On the issue of breach of contract, the Court of Appeal, surprisingly after finding that the contract document ie the MOD was invalid and unenforceable, agreed with the High Court that 'the learned JC is correct in his
H finding that the appellant's act was premature and amounted to a breach of contract'.

AT THE FEDERAL COURT

I **[36]** Leave to appeal to the Federal Court was granted on 20 January 2014 on the following questions, namely:

(a) whether a charge created by a co-operative society over its property in favour of a lender as security for a loan granted by the lender to a

developer, is ultra vires the Co-operative Societies Act 1993 and void if the lender and developer are not members of the co-operative society notwithstanding:

(i) the by-laws of the co-operative society; and

(ii) the purpose of the loan and charge, and its benefit to the co-operative society and promotion of the economy interest of its members (Question (1));

(b) if the answer to Question (1) is in the affirmative or the charge is otherwise ultra vires the Co-operative Societies Act 1993 and void, what are the remedies and obligations of the co-operative society in law (Question (2)); and

(c) where a sum of money deposited is charged in favour of a lender as security for a loan on terms that it is not to be withdrawn until the lender has exhausted all action against the borrower and other security providers, but the money is prematurely withdrawn by the lender before exhausting all action, whether the remedy of the chargor is:

(i) the return of the money, free of the charge; or

(ii) the restoration of the money (and any interest that would accrued) on deposit, subject to the charge (Question (3)).

THE BANK'S SUBMISSIONS

[37] In essence, the submissions by learned counsel for the bank can be summarised as follows:

(a) the Court of Appeal was wrong to apply the 2007 amendment ('Act A1297') in determining the validity of the MOD on the ground that at the time of the MOD was created by the Koperasi on 22 March 2002, the Koperasi (as well as other co-operative societies) were governed by the 1993 Act, as the 2007 amendment ('Act A1297') only came into force on 1 January 2008, six years after the MOD was created; and on settled principles, the 1993 Act, and not the 2007 amendment ('Act A1297'), is the applicable statute to determine the validity of the MOD;

(b) applying the 1993 Act, the MOD is not ultra vires the said act;

(c) the decisions of the Supreme Court in *Malaysia Shipyard* and *Chase Manhattan* and which were strongly relied upon by High Court as well as the Court of Appeal were based on the court's interpretation of the 1948 Act, in particular, ss 30, 31 and 32 thereof;

(d) the 1948 Act was completely repealed and subsequently replaced by the 1993 Act; and the matters covered by ss 30, 31 and 32 thereof were then governed by ss 51, 52 and 53 of the 1993 Act;

(e) under s 53 of the 1993 Act, other transactions between a co-operative society and non-members were then governed by the by-laws of the co-operative society concerned and applying s 53 of the 1993 Act, the MOD was not ultra vires the 1993 Act;

(f) the Koperasi's by-laws (particularly paras 4 and 5) expressly and by necessary implication, authorise the Koperasi to charge its assets and also to enter into transactions with non-members;

(g) the MOD created by the Koperasi in favour of the bank in the present case was directly and indirectly for the benefit of the Koperasi and the promotion of the economic interest of its members, thus was in accord with the main object of the Koperasi;

(h) the courts below were wrong to hold that the MOD was ultra vires the 1993 Act on the basis of the two Supreme Court decisions without regard to the by-laws of the Korperasi, the purpose of the loan granted by the bank and the MOD created by the Koperasi in favour of the bank, its benefit to the Koperasi and promotion of the economic interest of its members;

(i) it was also wrong for the courts below to hold that the bank was not entitled to rely on the by-laws of the Koperasi, given that s 53 of the 1993 Act expressly provides that other transactions with non-members are to be governed by the by-laws of the co-operative society concerned.

(j) that Question 1 on the issue of validity of the MOD ought to be answered in the negative, as the Koperasi was not prohibited or restricted by its by-laws from creating the MOD in favour of the bank.

(k) even if the courts below were right to hold that the MOD was ultra vires the 1993 Act and therefore void, they ought to have ordered the fixed deposit be returned, subject to the Koperasi restoring to the bank the advantage or benefit received by the Koperasi from the project development and the loan granted by the bank (to at least pay the sum of RM20,188,336.65 to the bank, being the amount certified by the Koperasi as the value of work done on the project land); the Koperasi therefore is obliged to make restitution and restore the benefit it enjoyed under the arrangement to the bank.

(l) even if the bank had breached the terms of the MOD (if the MOD is not ultra vires the 1993 Act), by uplifting the fixed deposit before exhausting all legal action against EFCM ('the borrower') and the other security providers, all the Koperasi was entitled to was re-instatement of the deposits subject to the terms of the MOD (to be put in a position as if the breach had not occurred) and damages (if any); and the Koperasi was not entitled to the return of the fixed deposit, free of charge created under the MOD; and

(m) the appeal by the bank ought to be allowed and the decisions of the courts below be set aside; and the bank's counterclaim for the shortfall of RM12m under the MOD should be allowed and judgment be entered against the Koperasi for the said sum of RM12m together with interest.

THE KOPERASI'S SUBMISSIONS

[38] Submissions by learned counsel for the Koperasi can be summarised as follows:

(a) both the High Court and the Court of Appeal were correct in coming to their decisions in favour of the Koperasi based on the facts of the case;

(b) the authorities relied on by the learned judicial commissioner and later adopted by the Court of Appeal (*Malaysia Shipyard* and *Chase Manhattan*) are correct and applicable to the facts of the present case;

(c) the bank had not asked for any relief that any advantage the Koperasi may have received be restored to the bank; this point had not been raised at the High Court nor at the Court of Appeal; and the bank should not be allowed to raise it now, before this court;

(d) it is trite law that parties are bound by their pleadings and the court can only decide on the pleaded issues;

(e) if the MOD has been declared void by the courts below, the facility agreement between the bank (as the lender) and EFCM (as the borrower) still remains valid and enforceable and the bank can still take legal action against EFCM (as the borrower);

(f) the loan was granted and released to EFCM (as the borrower) under the facility agreement, and not to the Koperasi; therefore the person who has received the advantage 'under such agreement or contract' is EFCM (the borrower) and not the Koperasi;

(g) there is no advantage received by the Koperasi under the MOD for the Koperasi to restore to the bank and the MOD only creates an obligation on part of the Koperasi;

(h) on the issue of the pre-mature uplifting of the fixed deposit and breach of the express terms of the MOD, the facts clearly demonstrate that the proviso to cl 4 of the MOD have not been fulfilled by the bank ie the bank had not exhausted all available legal actions or proceedings against the borrower and other security party to recover the amount due and owing by EFCM to the bank, before uplifting the fixed deposit and therefore the bank was clearly in breach of the terms of the MOD.

A FINDINGS

[39] In determining the validity of the MOD issued by the Koperasi in favour of the bank, we have to first determine the applicable law to the facts of the present case. This is because the High Court had strongly relied on the two Supreme Court decisions in *Malaysia Shipyard* and *Chase Manhattan* in coming to its findings that the MOD in the present case was invalid, void and unenforceable.

[40] It must be noted that the findings of the Supreme Court in *Malaysian Shipyard* and *Chase Mahathan* were based on the interpretation of the provisions of the Co-operative Societies Act 1948 (Act 287) ('the 1948 Act'), which were first enacted in 1948 as the FM Ordinance No 33 of 1948 and later revised and came into force on 18 August 1983. This 1948 Act was wholly repealed and replaced by the 1993 Act which came into force in February 1993).

[41] In *Malaysia Shipyard*, the respondent, a co-operative society registered under the 1948 Act, issued a guarantee whereby it agreed to indemnify the appellant therein, up to a sum of RM500,000 in the event of a certain company called Syarikat Pembinaan Azlin Sdn Bhd ('Azlin Sdn Bhd') failed to perform its contract with the appellant which was signed by the parties on 29 September 1975. Azlin Sdn Bhd failed to perform the contract, whereupon the appellant terminated the said contract and thereafter sued the respondent upon the guarantee. The said guarantee was given to a non-member for the benefit of another non-member. From the judgment, there was no indication as to the nature of the contract between Azlin Sdn Bhd and the appellant therein. There was also no evidence to show as to whose benefit the contract was for, and whether such transaction is conducive or otherwise to the economic well-being of members. The majority decision in that case (comprising of Salleh Abas LP, Abdul Hamid CJ (Malaya) and Abdoolcader SCJ) ruled that applying the provisions of s 32 of the 1948 Act, the said guarantee was ultra vires and void ab initio; while the dissenting decision (comprising of Wan Suleiman SCJ and Seah SCJ) ruled that the said guarantee was intra vires and was therefore lawful and valid. As aptly expressed by Seah SCJ; 'There is apparently no dispute as to the general principle applicable but we seem to differ on the interpretation of the provision of s 32 of the Act'.

[42] The Supreme Court considered the provisions of ss 30, 31 and 32 of the 1948 Act. For ease of reference, these sections are reproduced below:

> 30(1) A registered society may make loans –
>
> (a) to its members;
>
> (b) to its employees;

(c) to its subsidiaries; or

(d) to another registered society which has obtained the approval of the Registrar-General as pre-scribed by the rules.

(2) (Deleted by Act A334)

(3) The Minister may, by general or special order prohibit or restrict the lending of money on a mortgage or charge of any description of immovable property by any registered society or class of registered societies.

31 A registered society shall receive deposits and loans from persons who are not members only to such extent and under such conditions as may be prescribed by the rules or by-laws.

32 Save as provided in sections 30 and 31 the transaction of a registered society with persons other than members shall be subject to such prohibitions and restrictions as may be prescribed by the rules.

[43] The Supreme Court in interpreting the relevant provisions of the 1948 Act adopted an earlier principle as laid down by the House of Lords in *Small v Smith* [1884-85] 10 AC 119 at p 138 which was succinctly stated in *9 Halsbury's Law of England* (4th Ed), para 1333, at p 779 as follow:

The power of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.

[44] The majority decision of the Supreme Court in that case ruled:

In the present case before us, there is also no express provision in either the Co-operative Act (referring to the 1948 Act) or the rules enabling the Respondents to issue the guarantee and, if we apply the above-quoted words, it is clear that the Respondents have no power to issue the impugned guarantee. Section 32 which empowers them to enter into 'transactions' with non-members subject to prohibitions and restrictions prescribed by the rules is of no avail. For one thing the rules are completely silent as to the transactions referred to by the section and surely the absence of any provisions in the rules provides some indication that whatever transactions which a co-operative society can enter into these will not include the issuing of a guarantee.

[45] The majority decision ruled that s 30 of the 1948 Act deals specifically with loans given by a co-operative society to those parties listed therein; while s 31 deals with borrowings by a co-operative society by receiving deposits and loans from persons who are not members as prescribed by its by-laws. These two sections may not be directly applicable in the determination of the issue before the court.

[46] The majority decision in that case was later adopted and followed in another case, *Chase Manhattan* which interpreted the same provisions of s 32 of the 1948 Act in relation to the same issue of giving of guarantee by a co-operative society in favour of a third party.

[47] It must be noted that s 32 of the 1948 Act, which formed the basis of the Supreme Court decision in *Malaysia Shipyard* provides for '... such prohibitions and restrictions as may be prescribed by the rules'. As provided for under s 2 of the 1948 Act; 'rules' means rules made under the Act ie made by the minister under s 51 of the Act. Section 32 of the 1948 Act did not make any reference to by-laws of a co-operative society. Therefore, the Supreme Court had rightly referred to only the provisions of the act and the rules made thereunder in determining the validity of the guarantee without referring to any by-laws. This was clearly stated by Salleh Abas LP at p 360 of the report:

> The question is, therefore, this: Are the Respondents empowered by the Act and/or the Rules made under the Act to give such guarantee? If they are, the guarantee is valid and if they are not, the guarantee is not valid.

[48] As rightly found by the Supreme Court neither the provisions of the 1948 Act, nor the rules made thereunder, expressly empower the co-operative society to issue guarantee.

[49] As stated earlier, the whole of the 1948 Act was subsequently repealed and replaced by the 1993 Act which came into force in February 1993. The matters earlier covered by ss 30, 31 and 32 of the 1948 Act were then provided for in ss 51, 52 and 53 of the 1993 Act. In the instant case before us, all the relevant transactions particularly the issuing of the MOD by the Koperasi in favour of the bank, took place in 2001–2002, the period when the 1993 was fully in force. Therefore the relevant laws for consideration for the purpose of this appeal is obviously the 1993 Act.

[50] For ease of comparison ss 51, 52 and 53 of the 1993 Act are reproduced below:

> Loans by a registered society
>
> 51 (1) No registered society shall grant any loan or other credit facility except to –
>
> (a) its members;
>
> (b) its employees;
>
> (c) its subsidiary or subsidiaries; or
>
> (d) another registered society.
>
> and such loan or other credit facility shall be subject to–
>
> (aa) the regulations and by-laws of such society; and

(bb) in the case of its subsidiary or subsidiaries or another registered society, the approval of the Registrar General also.

(2) Subsection (1) shall not apply to a registered society that is permitted to grant any loan or other credit facility in accordance with the provisions of any other written law governing its operations.

(3) The Minister may, by general or special order, prohibit or restrict the lending of money on a charge or mortgage of immovable property by any registered society or class of registered societies.

Restriction on borrowing

52 (1) A registered society may, subject to the approval of its general meeting or special general meeting, borrow funds from its members and non-members to be used for a specific purpose in its business.

(2) A registered society shall determine annually, at a general meeting, the maximum limit of indebtedness in respect of existing and new borrowings and deposits which may be incurred in the coming year.

Restriction on other transactions with non-members

53 Subject to sections 51 and 52, the transactions of a registered society with persons other than its members shall be subject to such prohibitions and restrictions as may be prescribed by its by-laws.

[51] One material different between s 32 of the 1948 Act and s 53 of the 1993 Act which dealt with the same issue of 'Restriction on other transactions with non-members' is that the words 'the rules' in the 1948 Act had been substituted with the words 'its by-laws' in the 1993 Act, which is defined under s 2 thereof to mean the registered by-laws made by a registered society in the exercise of any power conferred by the act, and includes a registered amendment of the by-laws. The legal effect of this difference is that other transactions between a co-operative society and non-members are now governed by s 53 of the 1993 Act and these transactions are no longer governed by 'the rules' prescribed by the minister but by 'the by-laws' of the co-operative society concerned. Therefore, the decisions of the Supreme Court in *Malaysia Shipyard* and *Chase Manhattan* which interpreted different set of laws that has already been wholly repealed could not be applied, save/or the general pupils, in dealing with the instant case before us. The facts and the laws can clearly be distinguished. Under the 1993 Act, the 'by-laws' of a co-operative society has become an important element in determining the validity of 'other transactions between the co-operative and non-member'.

[52] For the purpose of the instant case, we can still adopt and follow the general principle of law as adopted by the Supreme Court in *Malaysia Shipyard* and *Chase Manhattan* that 'a corporation created by statute for particular purposes can only make such contracts as it is expressly or by necessary implication empowered to make by the statute creating it; and contracts

purporting to be made by statutory corporations which are outside the powers conferred by statute are ultra vires and void ab initio'. However, the relevant 'by-laws' of the Koperasi must also be considered.

[53] Paragraphs 4 and 5 of the Koperasi's by-laws are relevant and applicable to determine the issue under s 53 of the 1993 Act. Paragraph 4 provides:

> 4 Tujuan Koperasi ini ialah untuk memajukan kepentingan sosio-ekonomi ahli-ahli menurut prinsip-prinsip Koperasi dengan menggalakkan penanaman modal untuk menjalankan perniagaan dan pelaburan yang boleh menguntungkan.

[54] Paragraphs 5(c), (e), (f) and (g) provide:

> 5 Bagi mencapai tujuan tersebut, Koperasi bolehlah, tertakluk kepada peruntukan-peruntukan Akta dan Kaedah-kaedah, menjalankan sebarang kegiatan yang berikut:
>
> ...
>
> (c) membeli, mengambil, mendapatkan, memegang, memiliki, mempunyai, menguruskan, memajukan, menjayakan, mengembangkan, mengusahakan, menjualkan, tukar menukar, sewa menyewa, pajak memajak atau menggadai akan tanah-tanah untuk Koperasi ini atau bagi pihak ahli-ahli untuk ditanam dengan getah, kelapa sawit, kelapa dan lain-lain dan membuat apa jua yang perlu yang difikirkan boleh menjadi berfaedah kepada Koperasi ini atau ahli-ahlinya;
>
> (d) membeli, mendirikan, membangunkan, membina, memegang, memiliki atau mendapatkan dengan jalan menyewa, menerima pajak atau gadaian akan bangunan-bangunan yang hendak digunakan sebagai pejabat untuk menjalankan pekerjaan Koperasi atau untuk menjalankan perniagaan dan perusahaannya atau yang mustahak dan kesempurnaan bagi tempat-tempat kediaman pekerja-pekerja perusahaan Koperasi ini;
>
> (e) memegang, memiliki atau mempunyai lain-lain harta yang kekal dan yang boleh dianjak yang dikehendaki untuk tujuan-tujuan Koperasi ini;
>
> (f) menjual menyewa, memajakkan, menggadaikan, menukar, mengubah dan membaiki akan bangunan-bangunan dan harta-harta hak Koperasi ini dan membuat apa-apa jua yang difikirkan perlu;
>
> (g) membuat perjanjian dengan ahli-ahli dan bukan ahli dan mana-mana Koperasi yang berdaftar dengan tujuan memberi kemudahan bagi perjalanan Koperasi ini;
>
> ...

[55] Paragraph 4 of the by-laws and s 4(1) of the 1993 Act clearly provide that the object and purposes of the Koperasi is for the promotion of the economic interest of its members in accordance with co-operative principles 'dengan menggalakkan penamaan modal untuk menjalankan perniagaan dan

pelaburan yang boleh menguntungkan'.

[56] The terms 'co-operative principles' as defined under s 2 of the 1993 Act includes:

(a) voluntary and open membership;

(b) democratic management;

(c) limited return on capital contributed by members;

(d) equitable division of profits;

(e) promotion of co-operative education; and

(f) active co-operation among registered societies.

[57] A co-operative society once duly registered under the 1993 Act shall become a body corporate with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suit and other legal proceedings and to do all things necessary for the purposes for which it is constituted (s 9).

[58] In the present case, the evidence adduced show that the Koperasi was not a mere independent third party who gave guarantee to a loan facility granted by the bank to a total stranger. The evidence show that the Koperasi was the main 'actor' or the main participant in the whole series of related transactions right from beginning when on 26 February 2001 it acquired 100% equity of Terokai Pertiwi Sdn Bhd ('TPSB') which at that time held 66 years lease of the two lands in Gua Musang classified as agricultural lands for the purpose of oil palm plantation. The Koperasi intended to develop the lands into oil palm plantation; engaged EFCM as a consultant and contractor to carry out the project development; assisted EFCM to obtain loan facility from the bank and subsequently provided the MOD for a value of RM25m for the same purpose in favour of the bank. In fact after the project proceeded and loan disbursed by the bank, it was the Koperasi who issued the progress certifications for job completion for the purpose of progressive disbursement of the loan for the project. Under the MOD, the Koperasi promised to provide security deposit of RM25m, however only RM13m was provided (leaving a balance of RM12m). The contractor, EFCM, failed its repayment as scheduled in the facility agreement and the Koperasi also failed to top-up the balance of the security deposit under the MOD.

[59] As clearly stated in para 2 of the letter of offer dated 6 December 2001 issued by the bank, the loan was granted for the sole purpose of financing the development of the lands owned by the Koperasi (through its wholly-owned subsidiary, TPSB). In the project agreement with EFCM, the Koperasi has

agreed to deliver and deposit with the bank a sum of RM25m by way of security deposit for the loan (section 2.01(2) of the agreement). According to DW2, the Section Head of Portfolio Management & Control, Credit Risk Management Department of the bank, in his evidence:

> I would not have recommended for the approval of the loan and the loan would not have been granted to the Borrower had the Plaintiff refused to provide the Security Deposit. The loan was approved based on the Plaintiff's undertaking to provide the Security Deposit as stated in the Letter dated 13 November 2001.

[60] Further in his evidence, DW2 said:

> One of the conditions precedent for the effectiveness of the Development and Plantation Agreement was that the Borrower must have secured the financing. If the Plaintiff was unable to provide the Security Deposit, the collateral for the loan would not be sufficient and hence the defendant would not have provided the financing to the Borrower which would have the effect of rendering the agreement between the Plaintiff and the Borrower in respect of the Development Project ineffective.

[61] The project development for the oil palm plantation to be carried out by EFCM was a turnkey project whereby after the project completed and the lands have been developed and planted with oil palm, it would be delivered to the Koperasi, through its wholly-owned subsidiary, TPSB. The prospective revenue for the Koperasi for the sale of raw oil palms fruits was estimated to be RM140 for metric ton at that time.

[62] With this background, the Koperasi was not a total stranger or an independent third party that has no relation at all to the loan granted to EFCM. The Koperasi, clearly has an interest in the loan granted to EFCM because as testified by DW2, without the loan from the bank, the development and plantation agreement could not be affected and the oil palm project could not be carried out.

[63] At all material times, the Koperasi did not dispute the validity of the MOD provided by them to the bank. In fact a copy of the Koperasi's by-laws were handed over to the bank (through DW2) by one Encik Abu Samah, the general manager of the Koperasi at that time, to convince the bank that the Koperasi has the authority to provide the MOD in favour of the bank. The Koperasi only sought to dispute the validity of the MOD for the first time by a letter dated 31 December 2007 after the deposit was uplifted by the bank. In that letter the Koperasi claimed that the MOD was invalid and demanded the bank to return the amount deposited together with interest and profits.

[64] Generally, by-laws of a co-operative society, made by the society itself, are merely rules of conduct governing its internal management. This view was

expressed by the Supreme Court in *Malaysia Shipyard* and followed by the High Court and the Court of Appeal in the instant case. However, by-laws of a co-operative society has been given the force of law under s 53 of the 1993 Act. That being the case, in view of the provision of s 53 of the 1993 Act, non-members (including the bank) are entitled to rely on the Koperasi's by-laws as they relate to 'other transactions' with them.

[65] The word 'by-laws' has been incorporated under the present s 53 of the 1993 Act. Under s 2 of the 1993 Act, 'by-laws' refers to 'the registered by-laws' ie the 'by-laws' prepared by a co-operative society and registered by the registrar general of co-operative of the 1993 Act. Such 'by-law' may be amended and registered by the registrar general under s 18 of the 1993 Act, from time to time.

[66] Section 53 of the 1993 Act (as well as s 32 of the repealed 1948 Act) deals with 'transactions with persons other than its members'. The 'transactions' under s 53 are 'subject to ss 51 and 52'. Section 51 deals with loans to be given by registered co-operative society to the listed persons under sub-s (1). Section 52, deals with power of a registered co-operative society to borrow funds from members and non-members. We are of the view that the effect of words 'subject to ss 51 and 52' is that transactions with non-member cannot be inconsistent with ss 51 and 52 as regards to loans to be granted by a co-operative society and funds to be borrowed by a co-operative society from member and non-member. Therefore, 'transactions under s 53' cannot be transactions in the form of loans to be granted under s 51 and funds to be borrowed under s 51. 'Transactions' under s 53 must be one that relate to other types of transactions of a co-operative society subject to such prohibitions and restrictions as may be prescribed by its-by-laws.

[67] Abdul Hamid CJ (Malaya) (as he then was) in *Malaysia Shipyard* had expressed his view as a general rule on the word 'transactions' used in s 32 of the 1948 Act as follows:

> As can be seen, a guarantee is a transaction, in effect it is a contract whereby the Respondent accepts a commitment making itself liable to pay a sum of money upon the happening of a certain event. In essence, it is a contingent liability. As it is basically a financial commitment involving the payment of money, immediate or otherwise, the power so to do must in my view, be properly sanctioned by the Act.

[68] Wan Suleiman SCJ, in His Lordship's dissenting judgment, described 'transaction' in the following words:

> Before we proceed to consider whether the contract of guarantee comes within the express or implied terms of the statutory provisions, let us now consider what the word 'transactions' in section 32 means. First, I see no reason why the plain dictionary meaning of this word should not be applied. To 'transact' according to

A the Shorter Oxford English Dictionary is 'to carry through negotiations, to have dealings, to do business, to treat'. It is in the same sense that the word is used in *Smith v Small*, a decision of the House of Lords relied upon by the Respondents, of which I shall have more to say in a somewhat different context.

B The word 'transaction' will therefore include a contract at of guarantee. It is in the present instance a dealing, a business activity between Respondents and the non-member.

C I have considered, and with respect, would reject the argument that because loans and borrowings are specifically dealt with in two specific sections (sections 30 & 31), such an important matter as the power to give guarantees which is, at the very least as vital as the former two, should be specifically conferred by yet another section, the absence of which must raise grave doubts as to whether the legislature had intended to grant it, or that a general reference to 'transactions' can therefore refer to only dealings of a minor character incidental to the proper functioning of the Respondent society.

D

[69] Seah SCJ in His Lordship's dissenting judgment in *Malaysia Shipyard* expressed his view as follows:

E It is plain that section 32 expressly authorises and empowers the respondents to enter into transactions with non-members subject only to the limitations imposed by the rules contained in section 51 of the Act. Now, it is conceded that there is no rule, express or implied, forbidding the respondents from giving a guarantee to non-member. But it was adumbrated by learned counsel for the respondents that the word 'transactions' in section 32 ought to be given a restricted meaning and that

F the word does not extend to the giving of 'a guarantee'. With respect, I am unable to accede to this contention. 'Transactions' in the context of this case, must by necessity relate to all dealings, expressly or impliedly, authorised by sections 8 of the Act. Since the respondents are expressly empowered by section 8 to enter into contracts and since 'guarantee' is a form of contract under section 79 of the Contracts Act 1950 it seems to follow that 'transactions' as used in section 32 should

G be construed to include 'a guarantee'. A fortiori, in the case of *Small v Smith*, the House of Lords appears to have ruled that the expression 'transaction' included 'a guarantee'. I would adopt this construction and find there is no merit in this submission.

H

[70] There are limitations to the scope of 'transaction' allowable under s 53 of the 1993 Act. First, the transaction must not be inconsistent with ss 51 and 53 of the 1993 Act as regards to granting of loans and borrowing of funds by a co-operative society. Secondly the transaction must be with persons other than

I its members; and thirdly, such transaction shall be subject to such prohibitions or restrictions as may be prescribed by its by-laws. If the transaction is expressly prohibited by its by-laws, then it cannot be done by a co-operative society. The said transaction is thus ultra vires and void ab initio.

[71] In the instant case, exact nature of the MOD issued by the Koperasi in favour of the bank is in the form of a guarantee. On this point, Abdul Hamid CJ (Malaya) (as he then was) in *Malaysia Shipyard* clearly ruled that 'a guarantee is a transaction'. In effect it is a contract whereby the issuer or guarantor (in this case, the Koperasi) accepts a commitment upon happening of a certain event, and in relation to fund, it means 'a sum of money pledged as a contingent indemnity for possible loss'. The word 'guarantee' is defined in words and phrases legally defined to mean 'as accessory contract, whereby the promisor undertakes to be answerable to the promise for the debt, or miscarriage of another person, whose liability to the promise must exist or be contemplate'.

[72] It was also expressed by Wan Suleiman, SCJ in *Malaysia Shipyard* that 'the word 'transaction' will therefore include a contract of guarantee. It is in this present instance a dealing, a business activity between the respondents (the co-operative society) and the non-members'.

[73] The main general principle applicable, agreed and adopted by all the five judges in *Malaysia Shipyard* is that:

> The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporations, or may be fairly required as incidental to, or consequential upon, those things which the Legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.

[74] This general principle has been accepted and acted upon by the courts in England and in Malaysia (see *Colman v Estern Counties Rly Co*, *Small v Smith* and *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180).

[75] The gist of the said general principle as stated by Salleh Abas LP and Abdul Hamid CJ (Malaya) (as he then was) in *Malaysia Shipyard* is that 'the word 'transaction' under s 32 of the 1948 Act should only relate to such power as a co-operative society reasonably and properly requires for the purpose of carrying out objects of its incorporation. I would hasten to add that the word 'transactions' should also relate to such power to give effect to matters covered by the rule made under s 51 of the Act'.

[76] Applying the above general principle to s 53 of the 1993 Act and in view of the fact that the word 'rule' as appeared in s 32 of the 1948 Act, has been substituted with the word 'by-laws', we are of the view that the word 'transaction' (appearing in s 53) of the 1993 Act, should relate to such power to

give effect to matters covered by the Koperasi's by-laws, particularly paras 4 and 5.

[77] The object or purpose of incorporation of a registered co-operative society is an important element to be considered in determining whether a 'transaction' under s 53 of the 1993 Act is ultra vires the scope of the said section. In the present case, the object or propose of the Koperasi can be found in s 4 of the 1993 Act as well as paras 4 and 5 of its by-laws.

[78] Section 4(1) provides:

> 4(1) a society which consists of individual persons only and which has as its object the promotion of the economic interest of its members in accordance with co-operative principles may be registered under this Act as a primary society.

[79] Paragraph 4 of the Koperasi's by-laws provides:

> Tujuan Koperasi ini ialah untuk memajukan kepentingan sosio-ekonomi ahli-ahli menurut prinsip-prinsip Koperasi dengan menggalakkan penanaman modal untuk menjalankan perniagaan dan pelaburan yang boleh menguntungkan.

[80] As stated earlier, the issuing of the MOD by the Koperasi in favour of the bank is part of the transactions to carry out the Koperasi's object or intention to own and develop oil palm plantation by the contractor ('EFCM') in Gua Musang, Kelantan. It is not disputed in evidence that the MOD was the most essential collateral or security to the granting of loan by the bank for the EFCM to implement the project development on a turnkey basis for the benefit of the Koperasi through its wholly-own subsidiary, TPSB. According to DW2, without the MOD issued by the Koperasi, the bank would not have granted the loan facility; and without the loan facility, the lands in question in turn would not have been developed; and the Koperasi's oil-palm plantation could not have proceeded. Therefore, the issuing of the MOD by the Koperasi cannot be treated in isolation or independently. There was clear nexus between the loan facility granted by the bank to EFCM, the oil palm project in Gua Musang, the MOD and the benefits to be derived by the Koperasi upon completion of the turnkey project through its wholly-own subsidiary, TPSB. These transactions are clearly in line with the Koperasi's object for the promotion of the socio-economic interest of its members by way of capital investment and profitable business.

[81] The prospective revenue for the sale of raw oil palm fruits for the Koperasi upon completion of the project was estimated to be RM140 per metric ton at that time. Section 9 of the 1993 Act and paras 5(a), (d), (e), (f) and (g) of its by-laws empower the Koperasi to hold movable and immovable property of every description, to enter into contracts and to do all things

necessary for the purposes for which it is constituted. In other words, the issuing of the MOD in favour of the bank 'is necessary and properly required for carrying into effect' the purpose of its incorporation. In the circumtances of the present case, the MOD 'is necessary and properly required for carrying into effect the object or purposes of its incorporation'.

[82] The benefits to the Koperasi will ultimately be enjoyed as benefits to its members. The evidence adduced during trial clearly supported the existence of such benefits to the Koperasi, unlike the nature of guarantees in *Malaysia Shipyard* and *Chase Manhattan* which both concerned the giving of guarantees of doubtful propriety with no tangible benefit either directly or indirectly to the co-operative society or its members. The guarantees in both the cases mentioned above were purely for the benefit of independent third party beneficiaries which had no nexus whatsoever with the co-operative societies concerned.

[83] In the present case, the Court of Appeal, on 23 July 2013, affirmed the decision of the High Court and dismissed the bank's appeal. The reasoning of the Court of Appeal, in essence, is the same as that of the High Court, save for one material difference ie that in arriving at its decision the Court of Appeal applied the 1993 Act as amended by the 2007 amendment which only came into effect on 1 January 2008, about six to seven years after the relevant transactions had taken place. With due respect the Court of Appeal had erred in applying the 2007 amendment in determining the validity of the MOD. The relevant ss 51, 52 and 53 of the 1993 Act were substantially and materially amended by the 2007 amendment (Act A1297).

[84] The Court of Appeal held, inter alia, that the MOD in question was invalid and unenforceable as it was issued by the Koperasi in contravention of s 51(1) of the 1993 Act (as amended by the 2007 amendment). At para [34] of its judgment, the Court of Appeal ruled that s 51(1) expressly prohibits a co-operative society from granting any Islamic financing or giving credit facility except to the categories of persons mentioned therein. Apparently the Court of Appeal was relaying on the terms 'credit facility' under s 51(1) and its definition under s 2 of the 2007 amendment. In the said definition, 'credit facility' refers the same meaning as defined in the Malaysia Co-operative Societies Commission Act 2007 ('Act 665'), which was not even in existence then.

[85] With due respect the Court of Appeal should not have relied on provisions of laws which were not in existence or not in force at the time when the relevant transactions took place in 2001–2002. Section 19(1) of the Interpretation Acts 1948 and 1967 (Act 388) provides that 'the commencement of an act or subsidiary legislation shall be the date provided in

or under the act or subsidiary legislation or where no date is so provided, the date immediately following the date of its publication in pursuance of s 18'.

[86] When the MOD was issued by the Koperasi on 22 March 2002 the words 'credit facility' was not defined anywhere in the 1993 Act which was applicable then. It was only when the 2007 amendment and Act 665 come into force in 2008 that the words 'credit facility' was defined to mean, inter alia, '(c) the giving of a guarantee or the provision of any security in relation to the obligations of any person'; and applying the said definition, the Court of Appeal held that the MOD in question as a guarantee was a 'credit facility' and therefore its issuance by the Koperasi contravened s 51.

[87] Since the words 'credit facility' was not expressly defined in the 1993 Act when the MOD was issued by the Koperasi and it was also not defined in the 1948 Act, when *Malaysia Shipyard* was decided by the Supreme Court, the words must therefore be interpreted based on their ordinary usage in the English language ie a facility whereby money lent or made available or the ability to obtain goods and services payment under such an arrangement that payment will be made in the future (see *The Concise Oxford English Dictionary*).

[88] 'Guarantee' on the other hand, is slightly of different nature in its ordinary usage. This was clearly expressed by Abdul Hamid CJ (Malaya) (as he then was) in *Malaysia Shipyard* in the following words:

> First, what is a 'guarantee'. It is defined in the Shorter Oxford English Dictionary, in relation to fund, to mean 'a sum of money pledged as a contingent indemnity for possible loss'. The same word is defined in Words and Phrases Legally Defined to mean 'an accessory contract, whereby the promisor undertake to be answerable to the promise for the debt, or miscarriage of another person, whose primary liability to the promise must exist or be contemplated ... In effect it is a contract whereby the respondent (the promisor) accepts a commitment making itself liable to pay a sum of money upon the happening of a certain event'.

[89] Section 79 of the Contracts Act 1950 defines a 'contract of guarantee' as 'a contract to perform the promise, or discharge the liability of a third person in case of its default ... '

[90] Without an express definition in the relevant statute which governs the transaction in question, a 'guarantee' cannot be said to be a 'credit facility' under the scope of s 51 and 52 of the 1993 Act. In *Malaysia Shipyard*, Salleh Abas LP opined:

> The giving of a guarantee is neither giving nor receiving loan. It is a distinct and separate kind of dealing altogether. Although a guarantee purports to create liability on the surety, in no sense could it be said that the surety is borrowing the guaranteed sum from the creditor (the person to whom the guarantee is given) or giving a loan

of that amount to the principal debtor (the person for whose advantage the guarantee is given). (See In Re Queen Anne and Garden Mansions Co) Thus, since a guarantee is neither a loan nor a borrowing, both sections 30 and 31 do not apply to the giving of a guarantee by the respondents.

[91] The 1993 Act vide the 2007 amendment had no retrospective effect and therefore should not be considered at all in dealing with the present case. The 2007 amendment should not affect the previous operation of the 1993 Act or anything duly done or suffered thereunder. Such amendment also should not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed or amended law. This is clearly provided for under s 30(1) of the Interpretation Acts 1948 and 1967 (Act 388). The 2007 amendment is thus not applicable to the instant case. The present case has to be resolved according to the provisions of the 1993 Act prevailing at the time when the related transactions took place (see *Lembaga Jurutera Malaysia v Leong Pui Kun* [2009] 2 MLJ 36 (FC); *Keith Sellar v Lee Kwang Tennakoon v Lee Kwang* [1980] 2 MLJ 191; and *Badan Pengurusan Bersama Paradesa Rustika v Sri Damansara Sdn Bhd* [2014] 1 MLJ 14 (FC)).

[92] For the reasons above stated the answer to Question (1) posed before this court ought to be in the negative. Since Question (1) is answered in the negative, Question (2) (which exists on the assumption that the answer to Question (1) is in the affirmative) therefore need not be answered.

[93] Question (3) is only relevant and required to be answered if the MOD issued by the Koperasi in favour of the bank is not ultra vires.

[94] Question (3) is drafted on the premise that:

(a) there is a sum of money deposited and charged in favour of the bank as security for the loan to the borrower (EFCM);

(b) the terms of the deposit is that it is not to be withdrawn or uplifted until the bank has exhausted all action against the borrower (EFCM) and other security providers; and

(c) but the money deposited was prematurely withdrawn or uplifted by the bank before exhausting all the said action.

The real question is: where should the money go? – should it be returned to the Koperasi free of charge? or to be restored (with accrued interest) on deposit to the bank, subject to charge?

[95] The MOD issued by the Koperasi was 'a continuing security, pledge or lien for the due payment to the bank by the borrower on demand of all monies due to the bank during the facility period'. Under cl 2 of the MOD, the

Koperasi, inter alia, 'agrees and undertakes to continue to maintain the said deposit with the bank or at such places as the bank may from time to time direct during the period of this continuing security ... '.

[96] As stated earlier, cl 4 of the MOD empowers the bank to withdraw or uplift the said deposit and to apply the proceeds thereof towards the discharge of any amount due and owing to the bank, in the event the borrower (EFCM) fails to repay the loan due and owing to the bank during the facility period. However, this liberty to withdraw can only be exercised by the bank on condition that the bank has exhausted all available legal actions or proceedings against the borrower (EFCM) and other security parties to recover the amount due and owing by the borrower to the bank.

[97] Clause 13.2 of the 'facility agreement' also provide for the same provision that 'the bank hereby agrees with the borrower that in the event of the borrower commit any event of default or defaults as stipulated in cl 13.1 hereof within the facility period, the bank shall exhaust all available legal actions against the borrower and other security party before exercising the bank's right to utilise fixed deposit as provided by KPMNJ'.

[98] As a matter of fact, it is not in dispute that during the facility period, the borrower (EFCM) defaulted in its repayment of the loan. On 6 December 2007, the bank unilaterally uplifted the entire deposit to reimburse itself to set off part of the debts owed by EFCM.

[99] The evidence clearly show (even admitted by the bank's officer – DW1) that the bank had not exhausted all actions against the borrower (EFCM) and the other security parties before exercising its right to withdraw or uplift the fixed deposit as clearly require under cl 4 of the MOD and cl 13.2 of the facility agreement. No action was taken against the two chargors who had expressly covenanted to repay the loan granted to the borrower (EFCM) to the extent of RM25m. One of the properties charged by one of the chargors, was only sold by auction on 20 August 2008 (long after the fixed deposit had been uplifted on 6 December 2007). The bank apparently had sued the borrower (EFCM) and the individual guarantors and obtained judgment in default against them on 22 June 2007. However, no execution proceedings whatsoever were taken against them to enforce the said judgment in default. Yet, the bank proceeded unilaterally to uplift the fixed deposit on 6 December 2007. Clearly, the unilateral uplifting of the fixed deposit under the circumstances, amounted to a clear violation of the proviso to cl 4 of the MOD and cl 13.1 of the facility agreement by the bank. The said uplifting was premature and contractually invalid. In this respect, the High Court and the Court of Appeal were correct in coming to their decision that the bank's act amounted to a breach of contract.

[100] As has been held earlier, the MOD dated 22 March 2002 issued by the Koperasi in favour of the bank was valid and enforceable; and not ultra vires the relevant provisions of the 1993 Act. Being a continuing security pledge or lien for the due payment to the bank during the facility period, the MOD binds and can be enforced by both parties, the bank as well as the Koperasi. However, we are of the view that breach by the bank in prematuredly uplifting the entire fixed deposit in violation of the proviso to cl 4 of the MOD did not render the MOD void ab initio. In the circumstances of the case, all that the Koperasi is entitled to is to be put in a position as if the breach had not occurred. If the breach had in any way resulted loss to the Koperasi, damages would have to be assessed, so far as money could do so, to compensate the Koperasi by placing it in the same position as if the breach had not occurred.

[101] The above proposition was adopted by Parke R in *Robinson v Harman* [1843 – 60] All ER Rep 383 at p 385 when he said 'where a party sustain a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed'. If the Koperasi is to be put in a better position than it would have been if had there been no breach by the bank in prematurely uplifting the fixed deposit, then it would be contrary to the principle enunciated in established authorities (see *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350; and *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145).

[102] In the present case, the order of the High Court (and affirmed by the Court of Appeal) directing the return of the fixed deposit amount placed under the MOD to the Koperasi, when the loan for the purpose of the project development was disbursed by the bank based on the certifications of works done by the Koperasi and the oil palm plantation project was 63.4% completed, is clearly against above settled principle that the Koperasi should not be put in a better position than it would have been if the breach by the bank did not take place. All that should have been ordered in the present case is for re-instatement of the fixed deposits (with interest that would have accrued on them) subject to terms of the MOD which has earlier been held to be valid and enforceable in law (see *C & P Haulage (a firm) v Middleton* [1983] 3 All ER 94 (CA).

[103] For the various reasons adumbrated above and in view of the fact that the answer to Question (1) is in the negative, the answer to Question (3) should be that the Koperasi (as the chargor in the MOD) is only entitled to the reinstatement or restoration of the fixed deposit money (with any interest that would have accrued) subject to the terms of the MOD (the charge).

THE BANK'S COUNTERCLAIM

[104] The bank's counterclaim against the Koperasi is for the sum of RM12m (with interest and costs) being shortfall the Koperasi had agreed or undertook to pay progressively as security deposit pursuant to the MOD issued by the Koperasi in its favour.

[105] Under the MOD, the Koperasi agreed to deposit and charge in favour of the bank the total sum of RM25m only as a continuing security pledge or lien for the due payment of the loan by EFCM particularly as specified in the schedule thereto, as follow:

(a) 1 December 2001 – RM1m

(b) 1 March 2002 – RM4m

(c) 1 June 2002 – RM4m; and

(d) 1 June 2003 – RM16m

[106] As at 1 June 2003, the Koperasi however had only deposited and pledged the sum of RM13m with the bank under the MOD. By various letters (between 11 March 2004 and 27 December 2005) the bank had requested the Koperasi to deposit the shortfall of RM12m due under the terms of the MOD. The Koperasi however, failed to response. Consequently on 6 December 2007, the bank uplifted the RM13m deposit pledged under the MOD.

[107] In its defence to the counterclaim, the Koperasi denied liability on the sole ground that the MOD in question was issued beyond its scope of authority or power, under the relevant laws, the 1993 Act; and therefore was void ab initio and unenforceable.

[108] The High Court agreed with the Koperasi that the MOD was ultra vires and therefore void ab initio and unenforceable. On 19 June 2012, the Koperasi's claim was allowed and the bank's counterclaim was dismissed with costs. On 27 June 2012, the bank filed a notice of appeal, appealing against the whole decision of the High Court. Effectively, the appeal included that part of the decision dismissing the bank's counterclaim with costs. In the memorandum of appeal (to the Court of Appeal) the bank also stated that 'the appeal was against the whole of the said decision'. In (para 3) of its memorandum of appeal, the bank claimed, inter alia, that the learned judicial commissioner had erred in law and in fact when he dismissed the bank's counterclaim for the balance of RM12m to be paid to the bank pursuant to the MOD. The Court of Appeal on 3 June 2014 dismissed the bank's appeal (which in effect includes the bank's appeal on its counterclaim).

[109] The bank then, having obtained leave to appeal on 20 January 2014 appealed to this court against the whole decision of the Court of Appeal. The first ground listed by the bank in its memorandum of appeal dated 7 March 2014 states that: 'The Court of Appeal erred in law and in fact in affirming the decision of the High Court dated 19 June 2012, which allowed the respondent's (the Koperasi's) claim and dismissed the appellant's (the bank's) appeal'.

[110] In his submissions before us, learned counsel for the bank raised the issue of its counterclaim to the effect that the counterclaim should be allowed and judgment entered against the Koperasi for the sum of RM12m, together with interest at 5%pa from 1 June 2003 or such other date as may be ordered until the full payment, to be held under the terms of the MOD in question.

[111] With the above background, we feel that the issue of the bank's counterclaim is part of the present appeal before us and it is only proper and appropriate for this court deals with it here.

[112] The facts (based on the evidence available) that form the basis of the bank's counterclaim against the Koperasi is quite simple and straightforward. It is based on the validity of the MOD issued by the Koperasi to the bank. At the courts below (both High Court and the Court of Appeal) the bank's counterclaim was dismissed with costs on the sole reason that the MOD in question was void ab initio and unenforceable. But in this court, as we have concluded earlier that the MOD is (and still is) valid and enforceable. In effect it binds both parties, the bank and the Koperasi according to its terms.

[113] The schedule to the MOD, which is referred to in para 1.1 thereof, clearly and expressly provides that the total agreed amount of RM25m need to be deposited with the bank by 1 June 2003. Unfortunately, the Koperasi failed to fulfil this obligation, despite various reminders sent by the bank thus in breach of an important term of the MOD. The records show that as at 1 June 2003 the Koperasi had only deposited the sum of RM13m with the bank, thus leaving a shortfall of RM12m. Contractually, the Koperasi had committed a breach of its own MOD as agreed between them.

[114] The loan had been disbursed and the project in question had substantially been completed. According to the bank's records, it had in total disbursed the sum of RM23,935,050 under the loan facility for the purpose of the project. Any dispute as to the physical implementation of the project must be dealt with between the Koperasi and EFCM as the contractor based on the terms of the development and plantation agreement dated 12 November 20s01 entered into between the Koperasi and EFCM. The issue of non-completion of the project is not the concern of the bank. The bank's obligation is to provide

and disburse the loan as certified by the Koperasi in accordance with the facility agreement as well as the MOD. The bank may have been at fault in prematuredly uplifting the deposit in violation of cl 4 of the MOD, but that alone cannot be a ground for the Koperasi to refuse or neglect to fulfil its obligation to make payment as stipulated in the schedule to the MOD. Clause 15 of the MOD provides, inter alia, '... nor shall any single partial or defective exercise by the bank of any such right power privilege or remedy preclude any other further exercise under this memorandum of deposit or any other power privilege or remedy'.

[115] For the above reason and since the MOD is valid and enforceable, it is our considered view that the Koperasi is obliged to make payment for the shortfall of the deposit and therefore the bank's counter claim must be allowed.

CONCLUSION

[116] The factual matrix of the present case before us clearly show that the Koperasi was the main participant throughout the whole transactions right from beginning when it decided to acquire the whole equity in TPSB for the purpose of developing oil palm plantation for its own benefit in Gua Musang, Kelantan, until the time when it made a complete 'u-turn' claiming that the MOD issued by it for the purpose of obtaining loan from the bank which had effectively generated substantial benefit to it at the expense of the bank. In the circumstances, the conduct of the Koperasi was plainly inequitable and unconscionable which no court of law can condone.

[117] For the various reasons adumbrated above, we hold that the answer to Question (1) ought to be in the negative. Question (2) which exists and only relevant on the assumption that the answer to Question (1) is in the affirmative need not be answered.

[118] Since the answer to Question (1) is in the negative, Question (3) ought to be answered that the Koperasi (as the chargor in the MOD) is only entitled to the restoration of the money (with any interest that would have accrued) on deposit subject to the terms of the MOD which is still valid, enforceable and binding on the parties.

[119] The bank's counterclaim against the Koperasi is allowed.

[120] In the upshot, we therefore allow bank's appeals with costs and set aside the decision of the High Court and the Court of Appeal. We make an order that the bank to reinstate the fixed deposit money (with interest that would

have accrued) subject to the terms of the MOD, within 30 days from today. We also make an order that the Koperasi is to make payment for the shortfall of the deposit within 30 days from today.

Appeals allowed.

Reported by Afiq Mohamad Noor